SUPREME COURT, U. S.
No. 623

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In The
Supreme Court of the United States
OCTOBER TERM, 1967

ALASKA TRUCK TRANSPORT, INC., *Appellant,*

vs.

LYNDEN TRANSFER, INC., et al. *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

MOTION OF APPELLEE LYNDEN TRANSFER, INC. TO AFFIRM

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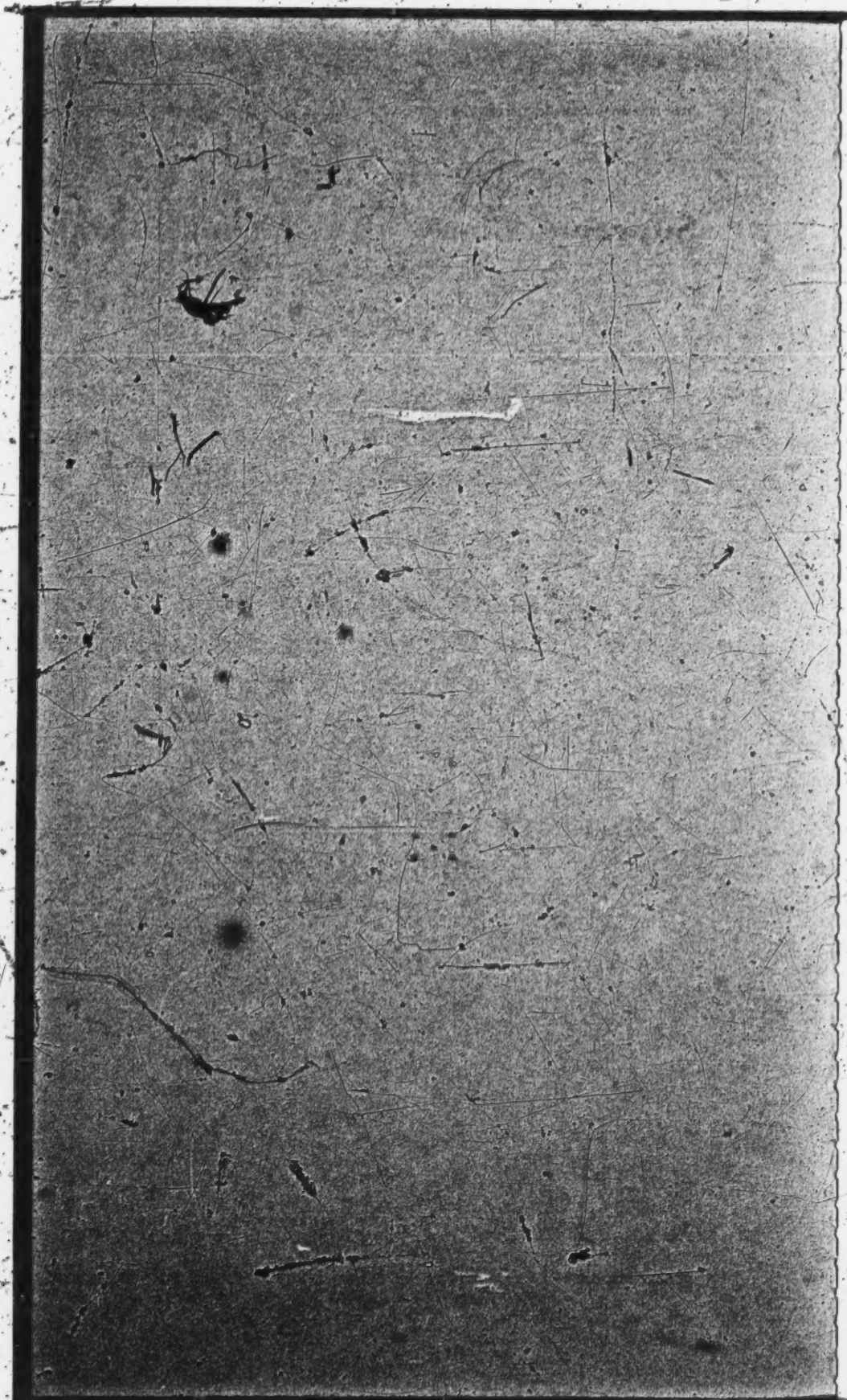

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RULE

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MOTION OF APPELLEE LYNDEN TRANSFER, INC. TO AFFIRM

Pursuant to Rule 16 (1) (c) of the Rules of this Court, LYNDEN TRANSFER, INC. moves that the judgment of the District Court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of a three-judge District Court setting aside an order of the Interstate Commerce Commission and remanding the case to that Commission.

In its Statement of the Case found in its Jurisdictional Statement, the appellant herein at great length elaborated upon the evidence and testimony presented

in the proceedings heretofore conducted by the Interstate Commerce Commission in this matter and the judicial review thereof by a three-judge District Court setting aside the ultimate ICC order. Appellant also alluded to many matters outside the record and to points of argument he desires to raise at this time.

The background of this case, which the appellant desires be presented to this court for determination, stated as briefly as possible as follows: In 1959 applicant filed an application with the Interstate Commerce Commission requesting authority to transport certain classes of commodities, including household goods, by motor vehicle between points in Alaska and Seattle, Washington and between Alaska and Great Falls, Montana. Hearings were held in Anchorage, Alaska in 1963. The Hearing Examiner served his report in June, 1964, recommending that the application be granted. After receipt of Exceptions to the recommendations of the Hearing Examiner, the Operating Rights Review Board of the Interstate Commerce Commission, in December of 1964, entered its finding that applicant had failed to establish the need for two major portions of its proposed service: the transportation of household goods, between Alaska and either Seattle or Great Falls, and the transportation of other commodities between Alaska and Seattle. The Operating Rights Review Board left in tact, however, the grant of authority to carry commodities other than household goods between Alaska and Great Falls, Montana. Applicant then petitioned for reconsideration, but Division One of the Interstate Commerce Commission, acting as Appellate Division, denied the petition, "for the reason that the findings of the Operating Rights Review Board No. Three are in accordance with the evidence and ap-

plicable law." Applicant then sought from the Commission a determination that an issue of general transportation importance was involved, but the Commission by order of May 12, 1965, found that no such issue was involved. In the same order, however, the Commission reopened the proceeding for reconsideration upon its own motion, without giving reason therefor. After reconsideration, in an opinion filed September 23, 1965, the Commission reversed the order of the Operating Rights Review Board and entered an order substantially identical to that recommended by the Hearing Examiner. Said order granted the applicant the authority to transport general commodities, including household goods, between points in Alaska and both Seattle, Washington, and Great Falls, Montana. Both North American Van Lines, Inc. and Lynden Transfer, Inc. had intervened as protestants in the ICC proceeding protesting the application for authority sought by the appellant herein. After the last Commission order was issued, North American Van Lines, Inc. petitioned to vacate the order and Lynden Transfer, Inc. petitioned for reconsideration, both of which petitions were denied and a certificate was issued.

Lynden Transfer, Inc. and North American Van Lines, Inc. then filed action in the District Court for the Western District of Washington requesting that a three-judge court duly constituted in that district find the Commission's order beyond the lawful authority of the ICC and void, and that the court set aside such order and enjoin its enforcement. By this court action, North American challenged only that portion of the order which authorized the appellant to transport household goods, and Lynden challenged only that portion which authorized applicant to transport

other commodities between Seattle, Washington, and Alaska.

By the action commenced in District Court the plaintiffs contended first that the Commission was without authority to reopen the proceedings for reconsideration upon its own motion, once the case had been remanded to the appellate division and that body had upheld the Operating Rights Review Board. Plaintiffs also contended that there was no substantial evidence to support the relevant grants of authority, and that therefore the Commission acted arbitrarily and capriciously in so doing.

The three-judge District Court ultimately determined that at the hearing the applicant-appellant adduced no substantial evidence of a need for any of its proposed services other than the transportation of non-household goods between Great Falls, Montana, and Alaska and concluded that the subsequent order of the ICC to the contrary was unlawful and the plaintiffs were entitled to a decree enjoining its enforcement. The District Court set aside the order of the ICC and remanded the case to the ICC for further proceedings. July 18, 1967, the Interstate Commerce Commission conducted further hearings in this matter at Anchorage, Alaska.

By its motion to intervene in the proceedings before the District Court this appellant "adopted in toto" as its own the Answer and Joint Brief of the United States of America and Interstate Commerce Commission. Appellant took no active part in presentation of the case to the District Court but was present in court during the proceedings. Feeling aggrieved by the decision rendered by the three-judge

District Court, the applicant-appellant now seeks review through appeal of that court's decision.

ARGUMENT

This appeal presents no substantial question warranting plenary consideration by this court.

After full consideration of the record made before the commission, briefs and arguments of counsel, the United States District Court of three judges concluded that the applicant had not adduced substantial evidence, as that phrase is interpreted by this court in *Consolo v. Federal Maritime Commission,* 383 U.S. 607 (1966), of a need for any of the proposed services other than the transportation of non-household goods between Great Falls, Montana, and Alaskan points which latter transportation was not a matter contested under the pleadings of the case.

By its Jurisdictional Statement filed herein, the appellant now attempts to interject factual matters and legal arguments it felt should have been presented to the District Court by counsel representing the United States of America and the Interstate Commerce commission whose pleadings and briefs have been explicitly adopted by the appellant as interveor in the District Court action. It is submitted that if the court does elect to take jurisdiction and hear the appeal presented by the appellant, the matters argued, presented and relied upon by the appellant in its Jurisdictional Statement will not be before this court since substantial portions of such matters are not a part of the record made before the administrative body, the Interstate Commerce Commission or the District Court.

The appellant having elected to adopt and be bound by the case presented by the United States of America and Interstate Commerce Commission now feels aggrieved by the case so presented and in effect only seeks the assistance of this court in relieving the appellant from its commitment to be so bound.

In its Jurisdictional Statement under the heading of "Statement of the Case" and "The Questions Presented Are Substantial" the appellant attempts to bring before this court evidence presented to the Interstate Commerce Commission in hearings totally foreign to the litigation involved in the case presented to the District Court which is presently on appeal as well as evidence of which the appellant desires this court be advised and which is a part of no proceeding before a court of law or administrative tribunal.

The appellant, feeling aggrieved by the decree entered by the District Court from which this appeal is prosecuted, is far from being left without remedy inasmuch as the Interstate Commerce Commission by hearing conducted as recently as July 18, 1967, has afforded the applicant, the appellant herein, the opportunity to present further evidence to support the application so as to be entitled to the Commission authority he originally sought and little would be gained in the face of such additional administrative hearings to further re-litigate the questions already presented and correctly decided by the District Court.

In view of the applicant's record made before the administrative tribunal and the correct application by the District Court of *Consolo* there is no occasion for further review by this court.

CONCLUSION

The appeal presents no substantial question warranting review by this court, and the judgment of the District Court should be affirmed.

Respectfully submitted,

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